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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-315

DEEPSOUTH PACKING CO., INC.,
Petitioner,

v.

THE LAITRAM CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT LAITRAM'S MEMORANDUM IN OPPOSITION TO APPLICANTS IRONS AND SEARS' MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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Applicants Irons and Sears are not *amicus curiae*. Applicants' Brief is not a brief *amicus curiae*.

The Limited Issue Before The Court

This case concerns an action for patent infringement. Petitioner Deepsouth filed, on August 31, 1971, a Petition for a Writ of Certiorari seeking review by certiorari of two opinions of the United States Court of Appeals for the Fifth Circuit (Appeals 28,286 and 29,776).

This Court granted, on January 17, 1972, Petitioner Deepsouth's Petition, but limited its grant to the issue of whether manufacture and sale by Petitioner Deepsouth within the United States of machinery intended for foreign use constituted violation of an oustanding injunction against infringement of valid claims of two United States patents (Appeal No. 29,776). *The Brief For The Petitioner reflects this limitation* (Pet. Br., pp. 2-3).[1]

On the same day, this Court denied the Petition of Petitioner Deepsouth in its entirety as such Petition related to Appeal No. 28,286, in which the Court of Appeals had affirmed the District Court's judgment (entered after an "elaborate" and "detailed" opinion "dealing *in depth*" with all issues raised (443 F. 2d at 930-931)) that one claim in each of two patents was valid, infringed and enforceable. These issues have been foreclosed. Petitioner's Brief recognizes this foreclosure (Pet. Br., p. 2, f.n. 1).

2. The Basis of Respondent's Opposition

Respondent opposes the motion of Applicants Irons and Sears for leave to file a brief *amicus curiae* and requests that such brief be stricken.

Respondent requests affirmative relief, pursuant to 28 U. S. C. § 1927, in the form of an award of Respondent's costs incurred in opposing Applicants' motion (*infra*, p. 7).

The purpose of a brief *amicus curiae* is to present the views of organizations of identifiable stature on matters that (1) concern the policies or interests of the particular organization and that (2) relate to issues accepted by this Court for review.

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[1]Abbreviations herein as follows: Pet. Br.—Brief For The Petitioner on the merits, filed March 2, 1972; App.—Appendix; Supp. App.—Supplemental Appendix. Unless otherwise indicated, all emphasis is supplied.

The proposed brief *amicus curiae* of Applicants Irons and Sears is filed solely on behalf of themselves as lawyers. Thus, the proposed brief *amicus curiae* does not fill function (1).

Significantly, the proposed *amicus curiae* brief is presented by one Applicant (Irons) who was the senior partner in a firm[2] which represented Petitioner Deepsouth before, during and after the trial on the merits of the two patents involved, as well as during a time when some of the operative facts occurred upon which the limited issue accepted for review by this Court was based.

Petitioner Deepsouth is still in debt to that firm (Motion, p. 1).

As to function (2), the larger part of the proposed brief *amicus curiae* is on matters decided by Appeal No. 28,286, as to which this Court has *denied* certiorari and has no relevancy to the disposition of the case. Rule 42(3), Rules of the Supreme Court.[3] The lesser part of the proposed brief duplicates portions of the Brief For The Petitioner on the merits.

3. Statement of Facts

Applicants Irons and Sears state in their Motion that their views are "generally" supportive of Petitioner (Motion, p. 1). Applicants' views are wholly supportive of the result Petitioner seeks. There is absolutely no indication that Petitioner's point of view as to the limited issue presented for review will not be adequately presented.

Applicants then state, in a footnote to their Motion (Motion, p. 1) that "Applicant Edward S. Irons has an

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[2]Applicant Sears was an associate in the same firm.

[3]Applicants Irons and Sears admit (Applicants' Proposed Brief p. 6, f.n. 7), that *neither* validity nor infringement issues are before this Court—then go on to argue validity (Applicants' Proposed Brief, pp. 16-27).

interest in an account receivable payable by Petitioner to a law firm in which Mr. Irons was once a partner and Applicant Mary Helen Sears was an associate".

A factual background of that footnote is necessary.

Applicant Irons was a partner and Applicant Sears an associate in the firm of Irons, Birch, Swindler & McKie (hereinafter "Irons, Birch") principal attorneys for Petitioner Deepsouth *before, during and after the trial on the merits* of the two patents adjudicated. Harold J. Birch (the Birch of Irons, Birch) was principal counsel for Petitioner Deepsouth at that trial and is principal counsel for Petitioner on this appeal. The time during which Mr. Birch (and Irons, Birch) principally represented Petitioner covered the time from the commencement of all pre-trial discovery conducted by Petitioner on the issues of validity and infringement, through the trial, and through the time when the form of the injunction against Petitioner Deepsouth was approved. *The interpretation and enforcement of that injunction are at stake* in the limited issue as to which this Court has granted certiorari.[4] The Irons, Birch firm gave Petitioner legal advice even as to the limited issue (*infra*, p. 5).

Finally, Applicants have presented nothing to indicate that their viewpoint on the limited issue accepted for review is, as they allege, "opposite to that currently popular in the Patent Bar" (Motion p. 2).

4. Reasons Why Applicants' Motion Should be Denied and The Brief Stricken

(1) Applicants are lawyers and represent, apparently, no one but themselves. Mere intellectual interest, if that be

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[4]Mr. Birch has never filed a formal withdrawal in the District Court. Respondent is informed that the Irons, Birch firm was dissolved in September, 1969.

the real interest of Applicants, cannot suffice to grant a motion for leave to file a brief *amicus curiae,* particularly in light of the nature of Applicants and of the nature of their proposed Brief. There is a paucity of cases that discuss the limited issue as to which the Court has granted review in terms of the patent law—the proposed brief *amicus curiae* cites no patent law cases not cited, or not duplicative of, those discussed exhaustively by Petitioner Deepsouth in its Brief on the Merits.

(2) Applicant Irons has admitted pecuniary interest in the outcome of this case. If Petitioner Deepsouth is victorious, Applicant Irons may financially benefit.

(3) The Irons, Birch firm represented Petitioner Deepsouth in this action through a time during which some of the basic operative facts occurred upon which the limited issue arose as to which this Court has granted review (see, e.g., App. 64-69, 350, 382; Supp. App. 494, 495; Rec. on pp.Vol.I,Skrmetta dep.2/25/70,pp.98,104-105).

(4) The most extensive of the two arguments made in Applicants' Irons and Sears proposed *amicus curiae* brief (at pp. 16-27) is directed to the *validity* of the patents. All issues relating to validity were disposed of by Appeal 28,286 and certiorari was *denied* on questions raised as to Appeal 28,286 by Petitioner Deepsouth (*supra,* p. 2). Applicants' argument as to validity is, in effect, an argument relating to Petitioner's Petition for a Writ of Certiorari as to Appeal No. 28,286, which petition was denied. Even if Applicants' Motion had been made during the pendency of Petitioner's Petition, Rule 42(1) of this Court states that: "Such motions are *not* favored".

What one cannot do directly, one cannot do indirectly. Yet that is what Applicants Irons and Sears seek to do insofar as the validity of the patents is concerned.[5]

5. Comment on Applicants' Brief Amicus Curiae

Respondent will not here attempt to correct the "facts" recited in, or refute any arguments in, Applicants' proposed Brief.[6] But, inasmuch as Applicants' Motion is physically annexed to the proposed brief without separation, two comments must be made:

(1) The first argument in Applicants' proposed brief (proposed Brief, pp. 8-16) does nothing more than replicate Arguments A., B. and C. found in Petitioner's Brief on the merits (Pet. Br., pp. 16-30).

(2) The second argument in Applicants' proposed brief (proposed Brief, pp. 16-27) is devoted solely to the opinion of the Court of Appeals on the validity of the patents. This Court denied Petitioner's Petition as such Petition related to any issue of patent validity.

Applicants seem to argue (proposed Brief, p. 24 and f.n. 33, p. 24) that third party investors in a patented invention should not be rewarded and that Respondent Laitram is nothing more than a "financial backer" of the

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[5]" . . . an amicus [sic] curiae cannot . . . take the case from one court to another by appeal or writ or error; cannot apply for a rehearing", *City and County of Denver* v. *Denver Tramway Corp.*, 23 F. 2d 287, 295 (10th Cir. 1927), *cert. den.* 278 U. S. (1928), or, differently, "friends [sic] of the court cannot introduce new issues" *Moffat Tunnel Improvement Dist.* v. *Denver & S. L. Ry Co.*, 45 F. 2d 715, 722 (10th Cir. 1930), *cert. den.* 283 U. S. 837 (1931).

[6]Corrections of those facts or refutation of the arguments would be an impossibility without the preparation of another appendix necessarily including substantial additional evidentiary materials, aside from the necessity of meeting the arguments in Respondent's Brief. Respondent's Brief is now due April 2, 1972.

"alleged" inventors. This is the wrong case for *that* argument. The same two inventors on each patent were the larger general partners in The Peelers Company (the entrepreneuring family entity, from the very beginning, of the Lapeyre pioneering efforts in shrimp processing inventions) and are President and Vice President and the two largest shareholders in Respondent Laitram,[7] successor to The Peelers Company.

6. Relief Requested By Respondent

Respondent urges that the manner[8] and fact of presentation of Applicants' Motion and Brief, and its content, calls for the application of the terms of 28 U. S. C. § 1927 by this Court: "Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs". See, e.g., *Weiss* v. *U. S.*, 227 F. 2d 72, 73 (2d Cir. 1955).

Consequently, Respondent requests, pursuant to 28 U. S. C. § 1927, that the costs of printing and filing this Memorandum in Opposition be assessed against Applicants.

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[7]Laitram is the middle name, spelled backwards, of one of the two Lapeyre inventors on the patents.

[8]Consent to the filing of Applicants' brief *amicus curiae* was requested of Respondent by Mr. Irons both orally and in writing on February 7, 1972. The written request said *nothing* about any account receivable due from Petitioner *or* about raising issues as to which certorari had been denied. Consent was denied orally and Respondent, after receiving, on February 9, 1972, this letter from Applicant Irons: "Miss Sears and I *withdraw* our letter of February 7, 1972 requesting consent to file an amicus curiae brief in the captioned case.", deemed no written explanation necessary of its oral denial of consent. No further communication was received by Respondent from Applicants Irons and Sears, until, unexpectedly, Applicants' Motion and Brief arrived.

In sum, Applicants Irons and Sears are not in a po
to file an *amicus curiae* brief and the proposed brief ra
far beyond the limited issue, and, as to that issue, d
cates portions of Petitioner's Brief. A prompt denial
Applicants' motion, and grant of Respondent's requ
relief, is earnestly solicited.

Respectfully submitted,

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Attorney for Respond